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DOES THE ORIGINAL INTENT COUNT: THE PAST AND THE PRESENT IN THE U.S. SUPREME COURT'S DECISION-MAKING PROCESS

"The Supreme Court is a constitutional convention in continuous session"
Woodrow Wilson

INTRODUCTION

One can say that American society is more conservative than liberal, as Americans are proud of their history and traditions, and seek to preserve the most important symbols of the nation. The highest position accorded to George Washington from among all the other U.S. presidents, the 'united-we-stand' symbolism of the American flag, as well as the worship of the U.S. constitution prove that the beginning of American statehood is an especially significant moment for most contemporary U.S. citizens. Despite the imperfection of the first President and the ambiguities of the federal Constitution, Americans still believe that the events and heroes of the late eighteenth century are close to ideal, as they gave birth to the greatest nation in the world. A positive social attitude towards the Constitution seems surprising, as the document confronts issues which have caused lively discussions concerning the scope of its protection of the fundamental rights and freedoms of the society and to the powers of the government. One should acknowledge, however, that most of these discussions have been initiated by specific interpretations of the document by the Supreme Court of the United States.

Since its landmark decision of 1803 (*Marbury v. Madison*),[1] the Court has been responsible for the power of judicial review; that is, determination of the constitution-

[1] 5 U.S. 137 (1803).

ality of acts created by the other branches of government, a power which, in practice, has led to a continuous process of interpretation of the U.S. Constitution. Therefore, if someone undermines or criticizes the meaning of particular phrases or clauses within the document, it means condemning the decision-making process of the Supreme Court, not the substance of the document itself. The Constitution, consisting of seven articles and twenty-seven amendments, may be found in almost every American home. What most American homes do not have is a thick constitutional law textbook. Such a textbook, full of judicial precedents originating from constitutional interpretation, might give a full answer to the question about the historical and contemporary meaning of the supreme laws and principles of the United States. Without judicial interpretation, the Constitution is vague and ambiguous, as it was intended only that it confront the general issues of the state's operation and social relations.

Since 1803 one can observe a never-ending process of constitutional interpretation imposed by the Justices of the Supreme Court, who have reshaped the meaning of many important political, social and cultural issues which have influenced the lives of the American people. This interpretation has led to numerous precedents referring to the powers of the government (federal-state relations, the scope of the separation of powers and the checks and balances system) and the powers of the people (the scope of the Bill of Rights guarantees, the role of the state in criminal and civil trials, the principles of democracy, the rule of law and equality). When one considers the last two hundred years of judicial review, there is hardly any area which has remained untouched by the influential hand of the federal judiciary: even individual rights to privacy have been recently confronted by the Justices. The question must be posed as to whether the idealized heroes of the founding-era, so often praised by American society, would be fond of the contemporary meaning of the document of 1787, redefined by hundreds of subsequent lawyers and legal theorists. Therefore, the main purpose of this paper is to analyze the decision-making process of some of the nineteenth and twentieth century Supreme Courts in order to find out what the main direction of the Justices' adjudication was: whether they decided to interpret the Constitution in accordance with the ideals of the Founding Fathers (so-called original intent) or whether they preferred to take into consideration the changing social and political reality. There have been many different methods of constitutional interpretation undertaken by the U.S. Supreme Court, and it is crucial to find out which one has been the most common method used by the Justices. The answer to this question may reveal the American attitude towards history, tradition, and fundamental values. The Constitution addressed these issues, but they have been frequently modified over the course of the past 200 years.

THE CREATION OF THE CONSTITUTION

The main reason for the Philadelphia Convention of 1787, which gathered more than fifty representatives of the states, was to revise the Articles of Confederation. The Articles turned out to be imperfect, creating a confederation in which the divi-

sion of powers proved to be impractical, due to the weak federal government, differences between the rich and poor states, economic crisis, and the lack of national judicial institutions.[2] The delegates, named the Founding Fathers,[3] among whom there were many distinguished statesmen, decided to prepare a new document that would organize the states into a federal republic. Despite many differences concerning the division of power, the role of the federal government and the relations among states, the Convention turned out to be a big success: the delegates created a constitution which, after its ratification by most of the states, became the fundamental document of the new country in 1788. The United States Constitution, as the supreme law of the land, regulated the most important issues concerning the political system and social relations, and implemented in seven brief articles six main principles: democracy, the rule of law, federalism, the supremacy of the Constitution, separation of powers and the checks and balances system.[4] All of these principles have influenced the shape and character of the country, while the separation of powers doctrine and the checks and balances system seem to be crucial for understanding the mechanisms that govern American political reality.

The delegates to the Philadelphia Convention repeatedly emphasized that in creating a government capable of promoting the public good, the Constitution must at the same time protect rights and respect the principles of justice. In order to achieve this, there should be no institution that would gain more power than the others. According to one of the most famous Justices, Louis Brandeis, 'the doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power.'[5] However, a pure separation of powers system would provide no protective weapons to enable members of each branch to check potential abuses of members in the other branches. That is why the checks and balances system was created, which did not contradict the separation of powers doctrine, but rather complemented it. The three branches of government were given special means by which they were able to partially participate in the work of the other branches. The weakest branch in this respect was the judiciary, which according to the constitutional provisions set out in Article Three could act as a mediator in legal disputes and declare which laws applied to a particular case. There was no refer-

[2] J.J. Patrick, R.M. Pious, D.A. Ritchie, *The Oxford Guide to the United States Government*, Oxford University Press, Oxford–New York 2001, pp. 30-31.

[3] It is impossible to list all of the famous names of the Convention, but there was an active group of leaders, such as George Washington, Edmund Randolph, James Madison, Thomas Jefferson, John Adams, Benjamin Franklin, George Mason, to name a few.

[4] More about the principles of U.S. Constitution read: A.R. Amar, *America's Constitution: A Biography*, Random House, New York 2006; W. Burnham, *Introduction to the Law and Legal System of the United States*, West Publishing Co., St. Paul 2004; A.E. Farnsworth, *Introduction to the Legal System of the United States*, Oceana Publications, Dobbs Ferry (N.Y.) 1996; J.M. Feinman, *Law 101: Everything You Need to Know About the American Legal System*, Oxford University Press, Oxford–New York 2000; R. Tokarczyk, *Prawo amerykańskie*, Zakamycze, Kraków 1998; P. Laidler, *Konstytucja Stanów Zjednoczonych Ameryki. Przewodnik*, Kraków 2007.

[5] *Myers v. United States*, 272 U.S. 52 (1926).

ence in the Constitution to the ability to control the activities undertaken by other branches of government; that is, the executive and legislature.

Two important issues need to be raised, as they are mutually exclusive: first, the attitude of the Founding Fathers towards the Constitution; and second, the scope of the separation of powers doctrine. According to most of the Framers, the highest law in the country was probably imperfect, but nothing more could be done at that time. In the words of Benjamin Franklin:

'[…] I agree to this Constitution with all its faults, if they are such; because I think a general Government necessary for us, and there is no form of Government but what may be a blessing to the people if well administered, and believe farther that this is likely to be well administered for a course of years, and can only end in Despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic Government, being incapable of any other. I doubt too whether any other Convention we can obtain, may be able to make a better Constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an assembly can a perfect production be expected? […]'[6]

The Founding Fathers agreed to establish a document which was general in substance for two main reasons: first of all, it was impossible to cover all of the issues, as the authors of the Constitution were not able to predict the direction of future social and political relations, and secondly, if they tried to list all of the issues which ought to be confronted by a young state, they would have created a code, not a constitution. Such an approach was confirmed by Chief Justice John Marshall in his famous opinion in *McCulloch v. Maryland*: '[…] We must never forget that it is a Constitution we are expounding […] intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs […]'[7] As a result of the general character of the Constitution, the document had to be interpreted from time to time in order to adjust it to the changing social, political and economic reality. Meanwhile, it is more than obvious that by equipping the judicial branch with the least powers of all the three branches of government, the Founding Fathers did not intend to grant the power of judicial review to the Supreme Court of the United States.[8] In other words, the Framers did not designate any institution as responsible for the interpretation of the Constitution! This paradox became visible after a few years of American statehood, and it was therefore only a matter of time until it would be properly defined.

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6 B. Franklin, *Benjamin Franklin's Final Speech in the Constitutional Convention*, 20 January 2009, at <http://www.nv.cc.va.us/home/nvsageh/Hist121/Part2/franklin.htm>.

7 17 U.S. 316 (1819).

8 Most of them regarded judicial review as an important power, but hesitated, however, to write it into the Constitution. See R. Hodder-Williams, *The Politics of the US Supreme Court*, George Allen & Unwin, London 1980, p. 5.

THE ESTABLISHMENT OF JUDICIAL REVIEW

Among the Framers there was only one person who raised the issue of constitutional interpretation by stating that the Supreme Court should gain more power than it had been granted in the Constitution. Alexander Hamilton, one of the authors of *The Federalist Papers*, felt that 'judges should do their duty as faithful guardians of the Constitution'. In the *Federalist nos. 78* and *79* he stated that 'the interpretation of the laws is the proper and peculiar province of the courts […] The courts must declare the sense of the law. They are to be considered as the bulwarks of a limited Constitution against legislative encroachments.'[9] Although the Framers had omitted the power of judicial review in the original text of the Constitution, sixteen years later the judiciary was enriched by this power, which became a new element of the checks and balances system. Importantly, however, judicial review was not inserted into the Constitution in the form of an amendment, but was instead created by a precedent of the Supreme Court.

If there were one case that could be called fundamental and paramount to the U.S. constitutional system, without doubt it would be *Marbury v. Madison*. There would be no contemporary shape or understanding of U.S. constitutional law without the Supreme Court's decision of 1803. The *Marbury* case provided the basis for the exercise of judicial review, allowing the judiciary to exercise the power to declare acts of other branches of government null and void, if they were inconsistent with the federal Constitution. What it really meant, however, was the beginning of judicial interpretation of the Constitution, which has now been exercised for more than 200 years, making judges the most powerful and influential actors in the U.S. political and legal scene. This case influenced not only the scope of American constitutional law, but it also allowed the courts to control other branches of government, changing the primary meaning of the checks and balances system.[10] The judiciary was to become stronger and very often superior to the executive and legislative branches of government, gaining more power than the Framers had agreed to grant it during the Constitutional Convention.

The case was decided in 1803 by the six-member Supreme Court with the famous John Marshall serving as a Chief Justice. He, above anyone else in the country, wanted to emphasize the vital and unique role of the federal judiciary in the U.S. governmental system, and therefore he had to find the fairest solution to the case. Although this landmark decision was delivered in 1803, the facts that led to the dispute took place a few years earlier. In the 1800 presidential elections, the Federalist Party candidate, President John Adams, was defeated by Thomas Jefferson who was to take office in March 1801. Adams used his remaining time as president to appoint more than forty federal judges to judicial posts created earlier by Congress, in which

[9] A. Hamilton in: *The Federalist Papers*, Penguin Putnam, New York 1999, nos. 78-79.

[10] W. Burnham, *Introduction to the Law…*, pp. 9-18.

the Federalist Party had the majority. However, the nomination, as well as confirmation by the Senate, was undertaken in the last two days of Adams' term. The final act of the appointment process, the delivery of signed and sealed commissions, was the responsibility of the secretary of state, John Marshall. Marshall, who had already been chosen for the post of the Supreme Court's Chief Justice by John Adams, delivered only some of the documents; the next day Thomas Jefferson began his presidential term. The new secretary of state, James Madison, refused to deliver the missing commissions, treating them as incomplete and void appointments. Among these undelivered commissions was one of William Marbury, who was appointed to the post of justice of the peace in the District of Columbia. Marbury sued James Madison in the Supreme Court in order to force him to deliver the commission.

Before reaching the final verdict, Justices had to answer questions concerning the validity of Marbury's appointment, his possible legal remedy, and the power of the Court to hear the case. John Marshall was aware of the fact that a ruling against Madison would lead to a serious constitutional conflict between the judiciary and the executive, which might eventually undermine the Court's position. On the other hand, the Chief Justice wanted to emphasize the vital and unique role of the federal judiciary in the U.S. governmental system, and therefore he had to find the fairest solution to the case. The result – the creation of the power of judicial review – proved significant and binding for future American judges, officers of the executive and members of the legislative houses, as well as many generations of U.S. citizens.[11] What Marshall really did, however, was to open the possibility of the judicial branch applying the changing standards of social and political relations to particular clauses of the Constitution, but it has always remained the Court's decision as to whether to confront some of these issues or not.

JUDICIAL ACTIVISM V. JUDICIAL RESTRAINT

Before addressing the question of the proper method of constitutional interpretation conducted by the Supreme Court of the United States, it is important to acknowledge that there have been two major approaches towards the scope of judicial review in history. The first, called judicial activism, means a 'philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent'.[12] The second, called judicial restraint, encourages the judges to limit their exercise of judicial review, thus upholding most of the new laws as being consistent with the Constitution. The judicial restraint doctrine appeals to the necessity of maintaining

[11] P. Laidler, *Basic Cases in U.S. Constitutional Law: The Separation of Powers*, Jagiellonian University Press, Kraków 2005, p. 34.

[12] B.A. Garner (ed.), *Black's Law Dictionary*, 8th Edition, Thomson/West, St. Paul (MN) 2004.

the principle of stare decisis; that is, respecting old precedents and displaying a reluctance to create new precedents.[13] Both approaches depended upon the individual attitude of Justices towards their role and mission as members of the highest judicial tribunal in the country. By closely examining the nineteenth and twentieth century decision-making process of the Supreme Court, one can easily name a few representatives of both approaches. The most famous judicial activists in the Court's history were John Marshall, Roger B. Taney, Earl Warren, Warren Burger and William H. Rehnquist, whereas among the opponents of that approach were Felix Frankfurter, Oliver Wendell Holmes, Louis Brandeis and John Marshall Harlan.

Although nobody used the term judicial activism at the beginning of the nineteenth century, it is obvious that in creating the power of judicial review, John Marshall ensured that he would become the prime mover of the activist approach. Nearly all of the decisions of the Marshall Court confronted the power of judicial review and broadened it, starting with the landmark decision of 1803. Such cases as *Fletcher v. Peck*[14] (judicial review of state law), *McCulloch v. Maryland* (necessary and proper clause) and *Gibbons v. Ogden*[15] (commerce clause) confirmed the Chief Justice's approach towards the unique role of the judiciary. Marshall's successor, Chief Justice Roger B. Taney, was not given the opportunity to become so active. However, some of the decisions of the Court in the 1840s and 1850s followed the pattern of broad judicial review. This was probably most visible in the 1857 decision in *Dred Scott v. Sandford*, where the Justices determined that slavery could be indirectly derived from the Constitution, thus throwing a rock into the stream of racial tensions between the North and the South of the country.[16] Due to this controversial precedent, the Supreme Court found itself in the middle of political activities which led to the outbreak of the Civil War. Similarly, among the twentieth century Justices there were many followers of Marshall's vision of a strong and influential judiciary. Certainly, three of the Chief Justices serving between 1953 and 2005 fall into the category of judicial activists; during these periods, their leadership influenced the Court's decisions, which had the effect of broadening the scope of judicial review. The Warren Court was responsible for many controversial and far-reaching decisions shaping the meaning of fundamental rights of the accused in criminal trials, establishing such constitutional principles as the exclusionary rule (*Mapp v. Ohio*),[17] the Miranda warnings (*Miranda v. Arizona*)[18] and the probable cause (*Terry v. Ohio*).[19] The Court also set new boundaries when it came to the various rights and freedoms of individuals, such as the equal protection clause (*Brown v. Board of Education of*

[13] J.J. Patrick, R.M. Pious, D.A. Ritchie, *The Oxford Guide...*, p. 192.

[14] 10 U.S. 87 (1810).

[15] 22 U.S. 1 (1824).

[16] 60 U.S. 393 (1857).

[17] 367 U.S. 643 (1961).

[18] 384 U.S. 436 (1966).

[19] 392 U.S. 1 (1968).

Topeka)[20] and the right to privacy (*Griswold v. Connecticut*).[21] The next Chief Justice, Warren Burger, despite possessing a different ideology and vision of the Court than that of Earl Warren, adopted a similar approach, which was reflected in the famous abortion dispute (*Roe v. Wade*)[22] and the separation of powers case (*United States v. Nixon*),[23] where Burger reaffirmed Marshall's approach towards judicial supremacy. Finally, the last of the three subsequent Chief Justices, William H. Rehnquist, proved active in some respects; that is, in commerce clause issues (*United States v. Lopez* and *United States v. Morrison*)[24] and the right to privacy (*Planned Parenthood v. Casey*, *Vacco v. Quill* or *Lawrence v. Texas*).[25] There is no doubt, however, that the most far-reaching example of judicial review was cast by the Rehnquist Court in the *Bush v. Gore* decision, which determined the outcome of the 2000 presidential elections in the United States.[26]

In contrast to judicial activism, the approach of the limitation of judicial review has been established by a few prominent Justices who have realized that the exercise of this power by the Supreme Court may lead to a violation of the constitutional principles of the separation of powers and checks and balances. Probably the best recognized representative of judicial restraint was Justice Felix Frankfurter, who served on the Supreme Court between 1939 and 1962. He considered the courts to be institutions which should not overturn the results of legislative judgment for any reason short of obvious conflict with a clear constitutional prohibition. Felix Frankfurter showed his approach in several cases concerning the interpretation of the Bill of Rights in connection with the Fourteenth Amendment's due process clause. While most of the Justices affirmed the necessity of incorporation of the fundamental guarantees of individuals into the states, Justice Frankfurter rejected such a process mainly in cases referring to freedom of religion, freedom of speech and the rights of the accused in criminal trials.[27] Moreover, his opinion in *Baker v. Carr* led to a limitation of the scope of judicial power by the adoption of the doctrine of political question.[28] Frankfurter was influenced by one of his predecessors, Oliver Wendell

[20] 347 U.S. 483 (1954).

[21] 381 U.S. 479 (1965).

[22] 410 U.S. 113 (1973).

[23] 418 U.S. 683 (1974).

[24] 514 U.S. 549 (1995); 529 U.S. 598 (2000).

[25] 505 U.S. 833 (1992); 521 U.S. 793 (1997); 593 U.S. 558 (2003).

[26] 531 U.S. 98 (2000).

[27] Frankfurter's self-restraint approach was visible in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940); *Colegrove v. Green*, 328 U.S. 549 (1946); *Adamson v. California*, 332 U.S. 46 (1947); *Dennis v. United States*, 341 U.S. 494 (1951) or *Rochin v. California*, 342 U.S. 165 (1952). More on this topic: C. Tomlins (ed.), *The United States Supreme Court: The Pursuit of Justice*, Houghton Mifflin Company, Boston 2005, pp. 266-268.

[28] 369 U.S. 186 (1962). The Supreme Court should not answer political questions because the U.S. Constitution has committed decision-making on this subject to another branch of the federal government; there are inadequate standards for the Court to apply; or the Court feels it is prudent not to inter-

Holmes, who, serving as an Associate Justice, proved to be less active than most of the Justices in the 1910s and 1920s. However, Holmes's opinions do not clearly and unequivocally refer to the need for judicial restraint, as he was inconsistent in his views towards the scope of freedom of speech, often changing his attitude from feeling that the Court should be less active to more active and vice versa.[29] It was rather Justice Louis Brandeis, who served before Frankfurter, who presented a more determined approach towards judicial deference. In the case *Ashwander v. T.V.A.* he wrote a famous concurring opinion stating that: 'the Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding, it will not anticipate a question of constitutional law in advance of the necessity of deciding it, it will not formulate a rule of constitutional law broader than the precise facts to which it is applied.'[30] Brandeis's opinion is often regarded as a self-restraint imposed on the Court by the Justices themselves, and the means proposed by him established the democratic boundaries of judicial review. The last of the above-mentioned Justices (and earliest) who sought to limit judicial powers was John Marshall Harlan, who served between 1877 and 1911. Despite the fact that Harlan is not considered to be a precursor of judicial restraint, his dissenting opinion in *Lochner v. New York* tends to be regarded as a leading example of the reluctance to broaden the meaning of the Constitution and the role of the judiciary.[31]

As one may observe, judicial activism or restraint has not been connected with the ideologies of particular Justices, since there have been both conservative and liberal active and restrictive judges. On the other hand, political ideology had an impact on the decision-making process of the above-mentioned Justices, who decided to adjudicate actively in particular cases because of their attitude towards a confronted issue, such as the powers of the government or the scope of the rights and freedoms of individuals. Similar conclusions may be derived while analyzing various methods of interpretation undertaken by different generations of American Justices.

DIFFERENT METHODS OF INTERPRETATION

There are three main elements which influence the decision-making process of a Justice, thus affecting his method of interpretation of a legal document: his political ideology (often combined with party-affiliation), his approach towards the role

fere. Thanks to the political questions doctrine, the Court shaped its own role in the political process. See F.N. Baldwin, 'Due Process and the Exclusionary Rule: Integrity and Justification', *University of Florida Law Review*, Vol. 39, No. 2 (1987), p. 512. See also W. Lasser, *The Limits of Judicial Power: the Supreme Court in American Politics*, University of North Carolina Press, Chapel Hill 1988, pp. 161-245.

[29] Holmes created the clear-and-present danger test in *Schenck v. United States*, 247 U.S. 49 (1919) but he limited his activism a few months later in *Abrams v. United States*, 250 U.S. 616 (1919). Such inconsistency was characteristic for Holmes' adjudication in the 1920s.

[30] 297 U.S. 288 (1936).

[31] 198 U.S. 45 (1905).

of the court (activism or restraint), and the substance of the reviewed case (there are some topics which should be reviewed, and some others which should not). From a different perspective, one may assume that there are two basic approaches which help us to understand the judicial decision-making process: a legal approach (that is, an effort to find a legally suitable answer to the case), and a policy-based approach, stemming from the personal policy preferences of a judge.[32] A considered analysis of the most important decisions of the U.S. Supreme Court leads to the conclusion that despite the existence of the legal and extra-legal approach towards the making judicial decisions, there are at least five methods of interpretation undertaken by the Justices of the Court:

– historical interpretation – referring to the 'original intent'[33] of the Framers and to the binding character of former precedents of the Court which, according to the doctrine of *stare decisis*, should not be changed;

– textual interpretation – based on the 'plain meaning' of the language and wording of particular constitutional clauses or phrases;

– structural interpretation – concerning the most important assumptions towards the structure and character of the government, as well as the social and political system;

– doctrinal interpretation – made with regard to theoretical and doctrinal principles and rules, which were established in the former judicial decision-making process;

– reasonable interpretation – taking into account more than one method of interpretation, which depends on the issue covered by a particular case.

All of the above-listed methods of interpretation seem vital for a contemporary understanding of the Constitution. However, if the role of history in the Court's adjudication must be examined, one should focus on the substance of the historical interpretation. Since it is the main area of analysis, the most space will be devoted to the character and meaning of this particular method, while it is important to understand the basic assumptions of the rest of the methods.

The textual interpretation refers to the exact meaning of the language contained in the reviewed document. From the Supreme Court's perspective it is the language of the Constitution which has the highest value in the U.S. legal system, and therefore some of the Justices decide to search for the 'plain meaning' of particular phrases and clauses of the supreme law of the land. On the one hand it has led to the defining of the exact words used by the Framers, which has made the interpretation closer to the original intent approach. On the other, however, the determination of the meaning of a constitutional clause has often been applied in consistency with changing

[32] J.A. Segal, H.J. Spaeth, S.C. Benesh, *The Supreme Court in the American Legal System*, Cambridge University Press, Cambridge–New York 2005, p. 19.

[33] To read more about original intent, see D. Barton, *Original Intent: the Courts, the Constitution, and Religion*, WallBuilder Press, Aledo 2004; L.W. Levy, *Original Intent and the Framers' Constitution*, Ivan R. Dee, Chicago 2000; K.E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*, University Press of Kansas, Lawrence 2001.

social and political relations. John Marshall, in *Gibbons v. Ogden*, devoted a lot of time simplifying the meaning of the word 'commerce' from the commerce clause of Article One, referring to the intent of the authors of the document.[34] But more than one hundred years later the Supreme Court introduced a different kind of definition of the same clause, using Marshall's approach to commerce only in part, and determining the scope of interstate commerce in accordance with trade and commercial relations of the 1930s and 1940s.[35] The problem with textual interpretation occurs, however, because of four significant reasons: the lack of precision of the English language, the need to find out the intent of the authors of the specific provision, the possibility of conflict between two similar phrases of one document, and the occurrence of two identical words with different meanings in the same legal source.[36]

Structural interpretation is very often connected with historical or textual interpretation, but it mainly refers not to the literal meaning of a clause, but to a broader understanding of the structure of institutions established by the clause. Therefore, this method may be applied in cases which concern the relations among various governmental officers and institutions, on both the federal and state level. Two of the most vital decisions in this respect are *United States v. Nixon* and *United States v. Morrison*. In the first, Chief Justice Warren Burger used the separation of powers doctrine to determine the scope of presidential executive privilege and the possibility of the judicial branch entering into the sovereignty of the executive.[37] The second case referred to the constitutionality of the independent counsel, an institution created in order to investigate possible violations of law occurring within the executive branch of government. Despite the fact that the majority of Justices confirmed the legality of the independent counsel's operations, it is the dissenting opinion of Justice Antonin Scalia which serves as a pure example of the structural interpretation of the Constitution. Justice Scalia emphasized the necessity of the Court to preserve the separation of powers doctrine as the main constitutional principle, and independent counsel did not fit into the proper structure of the American government.[38] Over time, Scalia's dissent was used as one of the justifications of the termination of the institution's existence in 1999 by the U.S. Congress. The weakness of the structural method is manifested in its rare application, as not all of the disputes decided by the Supreme Court refer to the character and structure of government.

Doctrinal interpretation belongs to one of the most used methods of interpretation of cases in civil-law systems, but it does not play such a role in common law countries. American jurisprudence pays less attention to the theoretical and doctrinal

[34] 22 U.S. 1 (1824).

[35] *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937); *United States v. Darby*, 312 U.S. 100 (1941) or *Wickard v. Filburn*, 317 U.S. 111 (1942).

[36] J.A. Segal, H.J. Spaeth, S.C. Benesh, *The Supreme Court...*, p. 24.

[37] 418 U.S. 683 (1974).

[38] 529 U.S. 598 (2000).

outcomes of a case, focusing on the practical aspects of the dispute, as is typical in precedential reality. There are, however, examples of cases in which the reference to doctrine seems more common and helpful for the Court. Most of the disputes concerning freedom of religion are decided in accordance with one of the two theoretical perspectives offered by the Justices: separationist and accomodationist. Both perspectives assume the necessity of the preservation of the secular character of the state, but they offer different understandings of the relations between state and church. The separationists interpret the First Amendment broadly, stating that it prevents the government from having any authority over religion. In practice, according to the followers of this perspective, any kind of governmental interference with religious institutions and other religious issues is forbidden. The accomodationist perspective refers to a narrower interpretation of the First Amendment and sets fewer limitations on the government with regard to the establishment clause. Accomodationists perceive possible cooperation between the state and church in building a common good and general welfare.[39] Both approaches have laid the foundations for the interpretation of the freedom of religion clause of the First Amendment, which has become the doctrinal background of such landmark cases as *Engel v. Vitale, Lemon v. Kurtzman*, *Wallace v. Jaffree* and *Zelman v. Simmons-Harris*.[40] There are hardly any other types of cases in which the Supreme Court reaches for theoretical and philosophical justification of its decision-making process. It is also obvious that the doctrine plays only a partial role in determining the scope of free exercise and free establishment clauses, as both textual and historical methods of interpretation are equally used by the Justices.

Finally, the reasonable approach concerns disputes in which the Court decides to apply all or most of the known and used methods of interpretation. Sometimes it is difficult to undertake only one approach which would fully determine the meaning of certain legislation or action, thus the Justices weigh the usefulness of other methods, such as historical, textual, structural or doctrinal. Analysis of some of the landmark Supreme Court cases leads to the conclusion that over time there have been more decisions based on the reasonable method of interpretation. The complexity of contemporary disputes creates the possibility for the Justices to refer on the one hand to the historical meaning of constitutional clauses, and on the other, to the changing social and political relations. The Court tries to balance between the present and the past, thus establishing timeless precedents. A problem occurs, however, when the reviewed case concerns controversial issues of constitutional law, which reveal Justices' attitudes towards these issues. This problem is especially acute with regard to the right to privacy issues, which constitute a conflict between the historical and modern approaches towards interpretation of the supreme law of the land. The effects of such problems are analyzed below.

[39] See D.H. Davis, 'Separation, Integration, and Accommodation: Religion and State in America in a Nutshell', *Journal of Church and State*, Vol. 43, No. 1 (2001), pp. 5-17.

[40] 370 U.S. 421 (1962); 403 U.S. 602 (1971); 472 U.S. 38 (1985); 536 U.S. 639 (2002).

HISTORICAL INTERPRETATION

There have been many examples of the application of historical interpretation by the Supreme Court, especially in the first period of the Court's adjudication, at the time of the Marshall Court. When John Marshall began his mission in the highest judicial tribunal in the country, as one of the Founding Fathers he was aware of the initial meaning of the Constitution as it had been established during and after the Philadelphia convention. Thus it was obvious which of the methods of interpretation would be offered by Marshall's Court during his thirty-four years of service. Despite the fact that at that time there was not a great deal of US history upon which to draw, the Justices nonetheless confirmed the historical approach of the Court in most of the landmark decisions made between 1801 and 1835, referring to the intent of the Framers. For example, in *McCulloch v. Maryland*, John Marshall wrote the famous statement determining the scope of the powers of the federal government, as viewed by him and his Court:

'[…] We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional […]'[41]

Marshall's approach, referring to the original intent of those who shaped the Constitution, was undertaken numerous times by subsequent Courts in the twentieth century, proving that such a method bore the test of time and was equally applicable one hundred as well as more than one hundred and fifty years later. In Lochner v. New York the Court stated that:

'[…] It is a question of which of two powers or rights shall prevail – the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor […]'[42]

As similar approach was visible in *United States v. Nixon*, where Chief Justice Burger praised his great predecessor John Marshall by referring to the doctrine of ju-

[41] 17 U.S. 316 (1819).

[42] 198 U.S. 45 (1905).

dicial review established in *Marbury v. Madison*. In reality, the 1803 case seems to be the first in which historical interpretation was broadly offered. Despite the fact that Marshall lacked specific constitutional provisions concerning the establishment of judicial review, he referred to the intent of the Framers, who created the supremacy clause of the Constitution and gave the power to guard it to the judiciary:

'[…] The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey? […]'[43]

Therefore, Marshall assumed that the interpretation of the Constitution by the Supreme Court originated from the character of the document, which lacked any direct provisions in this respect. In reality, *Marbury v. Madison* belongs to a pantheon of cases of which one can say that they rest upon various methods of interpretation (reasonable interpretation), which will be proved later in this paper. The historical approach is clearly noticeable in other parts of the earlier-mentioned *McCulloch* decision, when the Court derived the power of the people of the United States from the original decisions of the Philadelphia convention:

'[…] From these conventions, the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established", in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties […] The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit […]'[44]

The Marshall Court is the institution which used the word *intent* the most often in its history of adjudication. In almost every single case of constitutional significance, the Supreme Court under the leadership of John Marshall referred to the original ideas of the Founding Fathers. This is obvious in the wording of the *Cohens v. Virginia* opinion: 'We must endeavor so to construe the provisions as to preserve the true intent and meaning of the Constitution.'[45] It was also apparent in *McCulloch*

[43] 5 U.S. 137 (1803).

[44] 17 U.S. 316 (1819).

[45] 19 U.S. 264 (1821).

again: 'That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments.'[46]

The late nineteenth century and twentieth century Court's jurisprudence did not present the same attitude towards the word 'intent,' although there have been many decisions in which such a phrase occurred. However, the meaning of intent referred rather to the purpose of particular legislation which was established, thus influencing the powers of the government or the rights of individuals. The main role of the Court was to determine the constitutionality of legislation or specific action undertaken by the government (federal or state) as well as certain individuals. If such legislation or action violated the rights and liberties of the people, then the Justices had to find a compelling interest of the state or any other valid purpose which allowed it to stay in force.[47] Therefore, by examining the rules and principles of the Constitution, the Court determined the real and reasonable intent of the limitation of specific rights or freedoms of individuals or the power of the government. For example, in cases which shaped the scope of the commerce clause, one could read:

'[…] The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. This was so ruled in Coe v. Errol, (116 U.S. 517, 1886) […] And again, in Kidd v. Pearson, (128 U.S. 1, 1888) […] it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the state and belonged to commerce, and that, therefore, the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the state for export, did not constitute an unauthorized interference with the right of congress to regulate commerce […]'[48]

Similarly, in cases determining the powers of the executive:

'[…] The government says the phrase "continue in office" is of no legal significance and, moreover, applies only to the first Commissioners. We think it has significance. It may be that, literally, its application is restricted as suggested; but it, nevertheless, lends support to a view contrary to that of the government as to the meaning of the entire requirement in respect of tenure; for it is not easy to suppose that Congress intended to secure the first commissioners against removal except for the causes specified and deny like security to their successors. Putting this phrase aside, however, the fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause. But if the intention of Congress that no removal should be made during the specified term except for one or more of

[46] 17 U.S. 316 (1819).

[47] J.E. Nowak, R.D. Rotunda, *Constitutional Law*, West Group, St. Paul 2000, p. 778.

[48] *United States v. E.C. Knight & Co.*, 156 U.S. 1 (1895).

the enumerated causes were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act […]'[49]

Most often, however, the intent of the legislator and of the people has been at stake when the Supreme Court has adjudicated in disputes concerning the violation of individual rights and freedoms. Without finding a constitutionally-based justification of the limitation of specific powers, the Justices could not affirm the binding character of the reviewed law. Thus, the Court determined the intent of the person who indulged in certain types of speech, creating the so-called clear-and-present danger test in 1919, the bad tendency test in 1927 and the imminent lawless action test in 1969.[50] The scope of protection of other kinds of speech has also been defined by searching for the legitimate intent of the speaker, which concerns the fighting words doctrine, obscenity and symbolic speech.[51] It is not only freedom of speech, however, where such an approach has been introduced. Most of the cases regarding freedom of religion from the establishment clause perspective have determined the purpose of the legislator who was prohibited from establishing any state-based control over religion. For example, in the famous *Lemon v. Kurtzman* decision, the Supreme Court negated the possibility of governmental financial aid to any institutions with a religious affiliation, by examining the intent of the legislators:

'[…] Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in Allen, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference […]'[52]

As one can observe, history has been present numerous times in the decisions of various Supreme Courts. Not always, however, have these values prevailed over the necessity of applying new standards of interpretation to the changing social, political and economic reality. To fully understand the basis for the main reasons directing the Justices in their decision-making process, one should examine thoroughly the functioning of the stare decisis principle. It may reveal a proper perception of means and instruments which influence the adjudication of the contemporary Supreme Court, and it may give an answer to the difficult question of the necessity of preserving the original intent of the Framers.

[49] *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

[50] These doctrines were established respectively in cases: *Schenck v. United States*, 249 U.S. 47 (1919); *Whitney v. California*, 274 U.S. 357 (1927) and *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[51] The cases concerning the above-mentioned types of speech were: *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Roth v. United States*, 354 U.S. 476 (1957) and *Texas v. Johnson*, 491 U.S. 397 (1989).

[52] 403 U.S. 602 (1971).

DOES THE ORIGINAL INTENT COUNT ANYMORE?

The doctrine of stare decisis which is typical for the common law system refers to the Latin phrase *stare decisis et quieta movere*, which means: let the decision stand.[53] It holds that courts should follow the principle of law enunciated in previous decisions by the highest court within its jurisdiction, assuming that the principle is relevant to the current decision and makes sense in contemporary circumstances.[54] The doctrine was established in Medieval England and later spread to other common law countries, imposing on judges the necessity of following earlier created precedents. Despite the fact that the principles of the doctrine are taught in law schools in the United States, and that the judges are bound by decisions made by higher courts, they are not bound by their own precedents. This allows for the possibility of overturning a former decision of the court and applying a new rule consistent with the changing social, political and economic circumstances. In this respect the U.S. Supreme Court should follow its earlier precedents. However, the Justices are not bound by them and may modify or even overturn them. Such situation seems explicable in the case of flawed precedents which are in reality inconsistent with the Constitution. On the other hand, if no opportunity for creating new precedents existed, the role of the Supreme Court would be diminished and American society would still remain in the reality of the nineteenth century.

The doctrine of stare decisis is connected with the historical approach characteristic for some of the Justices, but not for all. The followers of the historical method of interpretation have often referred to the necessity of preserving the original meaning of the Constitution, as well as those precedents which were established in consistency with the supreme law of the land. Their reluctance towards any new principles and rules is understandable when the circumstances of the reviewed case resemble the circumstances of the earlier settled disputes. However, when Justices confront a situation to which none of the existing precedents can be applied, they are forced to create a new principle according to the modern circumstances. The biggest question concerns what the court should do in the case of a dispute to which, on one hand, the old rule may be applied, or, on the other, a new one can be established. On the issue of stare decisis and the historical method of interpretation, the Supreme Court once stated that:

'[…] Adhering to precedent "is usually the wise policy, because, in most matters, it is more important that the applicable rule of law be settled than it be settled right." […] Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." […] Stare decisis is the preferred course, because it promotes the evenhanded, predictable, and the consist-

[53] M.J. Gerhardt, *The Power of Precedent*, Oxford University Press, Oxford–New York 2008, p. 8.

[54] J.M. Scheb, J.M. Scheb II, *Introduction to the American Legal System*, Thomson Delmar Learning, New York 2001, p. 12.

ent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process… Stare decisis is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." […] This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible." […]'[55]

The application of the intent of the Framers has not always proved reasonable and correct. For example, original intent was used to justify the constitutional status of slavery. As delivered by Chief Justice Robert Taney in the majority decision to *Dred Scott v. Sandford*:

'[…] It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted […]'[56]

Slavery was banned by the Thirteenth Amendment to the Constitution in 1865, allowing the controversial precedent to last for only eight years. However, other criticized decisions of the Supreme Court remained unchanged for longer periods of time, leading to a public discussion of their suitability and fairness. Constitutional protection of racial segregation lasted for more than fifty years, established by the Court in 1896 in *Plessy v. Fergusson*, and overruled in 1954 by the *Brown v. Board of Education of Topeka* decision.[57]

The system of checks and balances created in the 1787 Constitution seems different from the one existing in the twenty-first century. The proposals set out by the Framers did not include the power of judicial review, which emerged from the *Marbury* precedent, probably because they assumed that the governmental system was properly balanced. Chief Justice John Marshall used the *Marbury* case to equip the system with an institution capable of confronting the social and political reality with the vision of the state introduced by the Founding Fathers. He believed that the power of judicial review stemmed exactly from the Framers' intent. It is unlikely, however, that all of the Framers would be today in favour of such a strong Supreme Court having the power to decide on the limits and meaning of federalism, separation of powers, competences of particular institutions, as well as controversial issues such as abortion, capital punishment and the rights of sexual minorities. On the other hand, is it really important to return nowadays to the original intent of the Constitution, as social, economic and political life has changed significantly? The United States has grown in strength and length, the population is about eighty times larger than during the Founding era, the territory is more than five times larger,

[55] *Payne v. Tennessee*, 501 U.S. 808 (1991).

[56] 60 U.S. 393 (1857).

[57] 163 U.S. 537 (1896); 347 U.S. 483 (1954).

the civilization and economy are far more advanced. Stare decisis is good justification for preserving past values in the case of minor changes within the society, but after 220 years of struggle for a better democracy and broader freedom, American society is a lot different than at the beginning of U.S. statehood. James Madison, Alexander Hamilton and Benjamin Franklin probably did not think about abortion, school prayers, affirmative action or euthanasia, but all of these issues have had to be confronted by the Supreme Court. As the final interpreter of the Constitution, the Court has had the possibility, and also the duty, to shape the scope of certain powers of the government and freedoms of the society. No matter if Justices decided to impose historical interpretation or dared to create a new precedential reality, no matter if they were more or less active, no matter if the result proved to be more conservative or liberal – the power of judicial review has put the Supreme Court in the middle of political tensions. And even if the Justices applied a narrower approach towards the judicial role in constitutional interpretation, which was clearly proposed by Justice Owen Roberts,

'[…] When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty – to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former […]'[58]

they could still be criticized for adopting a too narrow approach to a dispute which requires the application of a different method of interpretation. In this respect, whether the Court refers to the original intent of the Framers or decides to modify the existing precedents, it does not change the social and political perception of the institution as the final interpreter of the Constitution. Therefore, the Supreme Court plays an important role in preserving the history and past both by adapting the stare decisis doctrine where it is possible, and by applying modern approaches towards constitutional interpretation in order to adjust the intent of the Framers to the changing social and political reality.

[58] *United States v. Butler*, 297 U.S. 1 (1936).

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